December 22, 1999

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR99-3725

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130620.

The Texas Department of Transportation (the "department") received a request for certain hot mix designs and construction records for the hot mix production for two particular construction projects. You have submitted to this office representative samples of the requested information.[1] The department does not argue that the information requested is excepted from disclosure. You informed the contractor on the two projects, Haas-Anderson Construction, Inc. ("Haas-Anderson"), of the request and its responsibility to establish the applicability of an exception to disclosure should it seek to protect the information from public disclosure. Gov't Code § 552.305; *see* Open Records Decision No. 542 (1990). Haas-Anderson asserts that the information is excepted from disclosure based on section 552.110 of the Government Code[2].

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[1]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[2]The department did not timely request an open records decision from this office. *See* Gov't Code §552.301. Therefore, the information is presumed to be public, unless a compelling reason exists to withhold the information. *Id.* §552.302. The proprietary interests of a third party may present a compelling reason to protect information. *See* Open Records Decision No. 150 (1978).

Section 552.110 of the Government Code reads as follows:

> (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
>
> (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from [required public disclosure].

The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939).[3] Section 757 provides that a trade secret is

> any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939) The determination of whether any particular information is a trade secret is a determination of fact.[4] Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's business];
> (3) the extent of measures taken by [the company] to guard the secrecy of the information;

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[3] *Hyde v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

[4] Open Records Decision No. 552 at 2 (1990).

(4) the value of the information to [the company] and to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing the information; [and]

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[5]

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a prima facie case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.[6]

We have reviewed Haas-Anderson's arguments. We believe that Haas-Anderson has made a prima-facie case that the hot mix designs are trade secrets.

The requestor seeks to rebut Haas-Anderson's contention that the hot mix designs meet the part of the trade secret definition that says a trade secret "is not simply information as to single or ephemeral events in the conduct of the business." The requestor states that "each set of specifications for which a hot mix design is submitted to the [d]epartment . . . is determined based upon a unique set of engineering conditions. The design depends upon the particular specifications of the State. The design submitted is not submitted a single time for use on every job Haas-Anderson may be awarded." However, Haas-Anderson states its intention to use the designs on future projects and maintains that it has used the designs on several projects in the past. Therefore, we do not believe the requestor has rebutted Haas-Anderson's prima facie case as a matter of law. Accordingly, we conclude that department must withhold from disclosure the requested hot mix designs based on section 552.110 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

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[5]RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.–Austin 1999, pet. filed).

[6]Open Records Decision No. 552 at 5 (1990).

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Kay Hastings

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/jc

Ref: ID# 130620

Encl. Submitted documents

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